APPENDIX "A"

Statutes Involved

The Copyright Law

Section 1 of the Copyright Law, 17 U.S.C. Sec. 1 provides in pertinent part:

> "Sec. 1. Exclusive rights as to copyrighted works
>
> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> • • •
>
> "(e) To perform copyrighted work publicly for profit if it be a musical composition; . . ."

Section 101 of the Copyright Law, 17 U.S.C. Sec. 101, provides in pertinent part:

> "Sec. 101. Infringement
>
> "If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> "(a) Injunction. — To an injunction restraining such infringement;
>
> "(b) Damages and profits; amount; other remedies—To pay to the copyright proprietor such damages as the copyright proprietor may have offered due to the infringement, • • • or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, • • • and such damages shall in no . . . case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty."

Section 116 of the Copyright Law, 17 U.S.C. Sec. 116, provides:

> "Sec. 116. Costs, attorney's fees

"In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the cost."

The Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Sherman Act, 15 U.S.C. Sec. 2, provides in pertinent part:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor."

Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, provides in pertinent part:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees."

Section 16 of the Clayton Act, 15 U.S.C. Sec. 26, provides, in pertinent part;

"Any person, firm, corporation, or association shall be entitled to sue and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss of damage by a violation of the antitrust laws, including Sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger or irreparable loss or damage is immediate. . . ."

APPENDIX B"

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

TEMPO MUSIC, INC., ET AL., *Plaintiffs,* vs. INTERNATIONAL GOOD MUSIC, INC., *Defendant.*	CIVIL ACTION No. 5548
IRVING BERLIN, ET AL., *Plaintiffs,* vs. INTERNATIONAL GOOD MUSIC, INC., *Defendant.*	CIVIL ACTION No. 5773
COLE PORTER, ET AL., *Plaintiffs,* vs. ROGAN JONES and INTERNATIONAL GOOD MUSIC, INC. *Defendants.*	CIVIL ACTION No. 242 (Bellingham)
GERSHWIN PUBLISHING CORPORATION, ET AL., *Plaintiffs,* vs. K-91, INC., *Defendant.*	CIVIL ACTION No. 5771
IRVING BERLIN, ET AL., *Plaintiffs,* vs. WESCOAST BROADCASTING CO., *Defendant.*	CIVIL ACTION No. 2258

BETTY COMDEN, ET AL., *Plaintiffs,* *vs.* WESCOAST BROADCASTING CO., *Defendant.*	CIVIL ACTION No. 2415

Memorandum Opinion

SOLOMON, JUDGE: September 15, 1964

Irving Berlin, Richard Rodgers, Cole Porter and other owners of copyrights to more than 150 musical compositions, including such well-known songs as "White Christmas", "Easter Parade" and "Day and Night", filed actions against three radio broadcasting corporations and Rogan Jones, the president and principal stockholder of one of them, claiming violations of the federal copyright law. They seek statutory damages, orders enjoining defendants from future infringement of their copyright works, as well as attorney fees and costs.

Defendants admit the expropriation and the infringement of plaintiffs' copyrights, but they assert that plaintiffs are barred from maintaining this action because, among themselves and in conjunction with the American Society of Composers, Authors and Publishers (ASCAP), plaintiffs have conspired to fix prices and to engage in other unlawful practices in violation of the Constitution and the laws of the State of Washington, particularly Chapter 218, 1937 Session Laws (RCWA, Chapter 19.24) and the federal antitrust laws. Defendants also assert that plaintiffs have unlawfully extended their individual copyright monopoly in violation of the copyright laws, and that by reason of "unclean hands" they have neither

legal nor equitable standing to maintain these actions.

Defendants' at an earlier stage of these proceedings, before a different Judge, moved to join ASCAP as a party. The motion was denied. However, the defendants assert that while ASCAP may not be a necessary party, its activities are relevant because it acts as a licensing agent for the plaintiffs and because of plaintiffs' illegal arrangements with it.

Plaintiffs are among 8800 members of ASCAP, whose combined inventory of over one million musical compositions is commonly referred to as the ASCAP repertory. The relationship between ASCAP and its members, as well as the operations of ASCAP as a licensing agent of the members, has been under the scrutiny of the United States Department of Justice for more than a decade. Its practices are guided by the Amended Final Decree of 1950 and the order entered in the same action on January 7, 1960. All of the plaintiffs granted ASCAP a non-exclusive right to license non-dramatic performances for profit of their copyrighted compositions.

Under the terms of the Amended Final Decree, ASCAP may not license the use of the individual compositions except on application of both user and copyright owner and ASCAP may not refuse to license prospective users of compositions from its repertory. In case of disputes concerning license fees, the Amended Final Judgment provides for judicial determination of reasonable fees in the United States District Court for the Southern District of New York.

Plaintiffs have reserved the right to license their own compositions to any user on any mutually agreeable basis,

and in these cases the plaintiffs as individuals seek to enforce their copyrights.

Most of the evidence in this case was stipulated in a long and carefully prepared pre-trial order. I have studied the statement of admitted facts, the evidence adduced at the trial, the exhibits, as well as the excellent memoranda of authorities submitted by both the plaintiffs and the defendants, and I have concluded that the plaintiffs are entitled to prevail.

I had hoped to prepare a written opinion setting forth not only my reasons for such conclusion, but also an analysis of the authorities upon which I relied. However, illness as well as the press of other judicial business has prevented me from doing this. I believe that the interests of the parties will be served best by announcing my decision without further delay. I also concluded that such an opinion would be of limited value because there are practically no controverted issues of fact and because both plaintiffs and defendants are represented by competent counsel who will present adequately their arguments to the Court of Appeals.

I find that plaintiffs have complied with the statutory requirements of the State of Washington. Defendants have failed to prove that ASCAP's registration of the songs in its repertory was inadequate or that plaintiffs or ASCAP violated the Washington law relating to the pooling of copyright interests without providing for per piece licensing (RCWA 19.24.020); or that the filing of these and other actions by the plaintiffs to enforce their rights under the copyright laws constituted an abuse of either State or Federal process. There is no evidence of any

abusive practices by either the plaintiffs or their licensing agent which would deny them copyright protection.

I further find that there is no merit in defendants' contention that they did not take licenses with ASCAP because they feared State prosecution. I find that they failed to take licenses only because they wanted to avoid paying license fees on the same basis charged other broadcasting companies. I further find that defendants made no attempt to contact plaintiffs individually for the purpose of obtaining licenses to play plaintiffs' songs on a per piece or any other basis.

Defendants have admitted that it would be virtually impossible to deal with the composers on an individual basis for the rights to perform their songs for profit. Their contentions as to what the law requires would not only make it virtually impossible to police the use of copyrighted songs, but would also greatly increase the cost of administration. The enforcement of the Washington statute, as construed by the defendants, would not only jeopardize the efficient licensing and policing of performance for profit, which can only be done by licensing organizations such as ASCAP, BMI or SESAC, but it would also deprive plaintiffs and all other copyright owners of the privilege of profiting from their federally granted copyright monopoly.

To construe the provisions of the Washington statute (RCWA, Chapter 19.24) so as to make the acts of the plaintiffs or ASCAP in this case unlawful would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants. However, even if plaintiffs' conduct in any respect can be considered a violation of either RCWA, Chapter 19.24, or the federal copyright or antitrust laws, their violations are so minimal and the violations of the defendants so unconscionable that plaintiffs should not be deprived of the right to maintain these actions for the deprivation of their property.

I also find the defendant Rogan Jones, who is and has been the dominant influence in defendant International Good Music, Inc., and who has determined its policies for more than 25 years, is equally liable with the corporation for these infringements.

In accordance with Section 101 of the Copyright Law (17 U.S.C.A Sec. 101), plaintiffs have elected to seek statutory damages in lieu of actual damages and profits. For the violation of each copyright, statutory damages not exceeding the sum of $5,000 nor less than $250 may be assessed. Defendants have deliberately appropriated the property of plaintiffs as well as the property of many other copyright owners for more than a quarter of a century, and they have greatly profited by their wrongful conduct. The conduct of International Good Music, Inc., and its president Rogan Jones has been particularly flagrant. However, I have decided to fix damages for each violation at only $350.00 jointly against defendant International Good Music, Inc., and Rogan Jones. I have decided to fix damages against Wescoast Broadcasting Co. and K-91, Inc., for each violation at $250.00.

The prevailing parties are also entitled to attorney fees as part of costs. The parties stipulated that I may fix the fees without taking testimony. I realize that plaintiffs' attorneys will charge much more than I will allow them and that they are entitled to such higher fees. Although $15,000.00 is a modest fee to allow plaintiffs in all of the consolidated cases, I will allow that amount. It may be allocated among the cases in accordance with the amount of statutory damages allowed in each case.

Plaintiffs are also entitled to an injunction restraining the defendants from future infringement of plaintiffs' copyrighted songs.

Defendants' counterclaims are dismissed.

Counsel for plaintiffs shall prepare appropriate findings of fact, conclusions of law and a judgment for plaintiffs, all in accordance with this memorandum opinion.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

GERSHWIN PUBLISHING CORPORATION, REMICK MUSIC CORPORATION, BROADWAY MUSIC CORPORATION and BUXTON HILL MUSIC CORPORATION, *Plaintiffs*, v. K-91, INC., *Defendant*.	CIVIL ACTION No. 5771 JUDGMENT

This action came on for trial before the court, Honorable Gus J. Solomon, United States District Judge, presiding, and the issues having been duly tried, and a decision having been duly rendered, and the court having made findings of fact and conclusions of law,

IT IS ORDERED AND ADJUDGED that:

1. Defendant and all persons acting under the direction, control, permission or license of defendant are enjoined and restrained permanently from publicly performing plaintiffs' copyrighted musical compositions and from causing or permitting said compositions to be publicly performed by defendant's radio station or in any place owned, controlled or conducted by defendant and from aiding or abetting the public performance of such compositions in any such place or otherwise;

2. Plaintiffs recover of defendant the amount of $1000, with interest thereon at *the* rate of 6% per annum as provided by law, and the costs of this action;

3. Plaintiffs' costs shall include the amount of $252.31, as an attorneys' fee.

Dated: January 18, 1965.

Clerk of the Court

APPENDIX "C"

United States Court of Appeals For the Ninth Circuit

K-91 INC., *Appellant*, v. GERSHWIN PUBLISHING CORPORATION, ET AL., *Appellees.*	No. 20074

(January 13, 1967)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Before: BARNES, KOELSCH and DUNIWAY, Circuit judges

BARNES, Circuit Judge:

This is an appeal in a civil nonjury case from a judgment in favor of the appellees, the owners of copyrights on various musical compositions. Appellant, a radio station operator in the State of Washington, played these musical compositions on the air without the permission or consent of the appellees. Appellees filed a complaint, under 17 U.S.C. Secs. 1, 101, seeking damages for and an injunction against such infringement. Appellees prevailed, and the court below entered judgment awarding them $1000 damages and enjoining further infringement. The trial court had jurisdiction under 28 U.S.C. Secs. 1337, 1338, and we have jurisdiction of the appeal under 28 U.S.C. Sec. 1291.

Appellant, both in the trial below and on oral argument before this court, admitted the expropriation and infringement of appellees' copyrights, but claimed appellees were misusing their copyrights in violation of public policy generally, and particularly in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Secs. 1, 2. Therefore, appellant contended, no relief should be granted because appellees had come into court with unclean hands. It was charged that appellees had, between themselves and in conjunction with the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), conspired to fix prices and to engage in other unlawful practices, in violation of (a) the Sherman and Clayton Acts, and (b) the laws of the State of Washington, particularly R.C.W. Sec. 19.24.020. Appellant also counterclaimed seeking treble damages and an injunction against further misuse of the copyrights. Fed. R. Civ. P. 13(a), 15 U.S.C. Secs. 15, 26. This relief was denied.

This case cannot be understood without an analysis of the role of ASCAP. ASCAP is an unincorporated membership association comprising over 8000 author, composer and publisher members who own copyrights on various separate musical compositions. (Finding of Fact No. 16, C.T. p. 196). ASCAP functions as a licensing agency for the composers, authors and publishers. When someone in the professional entertainment field wants to perform a copyrighted piece, they merely secure a license from ASCAP rather than seeking out the individual composer, author and-or publisher whose work they want to perform. ASCAP charges a fee or royalty for the license, and its members periodically receive royalty distributions from ASCAP.

In the 1940's the Justice Department became concerned over the operations of ASCAP and its overwhelming position in the entertainment field. Suit was brought under the antitrust laws to prevent restraints of trade by ASCAP, which resulted in the Amended Final Judgment of March 14, 1950, in the United States District Court for the Southern District of New York in Civil Case No. 13-95, 1960 Trade Cas. ¶ 69,612 (S.D.N.Y.). There is no claim in this case that ASCAP and appellees, ASCAP members, have not conformed to the terms of the Amended Final Judgment.

We note three specific requirements of the Amended Final Judgment:

(1) The rights acquired by ASCAP to license the public performance of copyrighted compositions must be non-exclusive;

(2) The license fees or royalties must be reasonable, and if there is a dispute as to the reasonableness of the proposed fee, the fee will be set by the United States District Court for the Southern District of New York; and

(3) A license must be granted on the same terms and conditions to all applicants similarly situated.

Basically, appellant challenges the lower court result in three aspects: (a) failures to make certain findings of fact; (b) failure to find violations of the federal antitrust laws; and (c) failure to find violations of the Washington State antitrust laws. We treat them in that order.

I. *Failures to Make Certain Findings*

Appellant lists eight examples of the court's failure to find. Among them are the facts that: the ASCAP repertory

(inventory of copyrighted compositions) includes more than a million musical compositions; that ASCAP is managed by a Board of Directors which sets the fees for its licenses; that music is a necessity to the broadcasting industry within the State of Washington and throughout the United States; and that each musical copyright is unique. We think that in view of the detailed findings of fact and conclusions of law made by the trier of fact (C.T. pp. 193-217), these eight examples (four of which we have cited) of the failure to make specific findings, are without enough substantial merit to constitute reversible error.

Instead of finding that one million musical compositions were controlled by ASCAP, the court found that ASCAP is made up of over 8000 members (Finding of Fact No. 16, C.T. p. 196); is but one of three music licensing organizations in the United States, which together license substantially all of the copyrighted musical works in the United States (Finding of Fact No. 18, C.T. pp. 196-97); and that fifty per cent of all performances of copyrighted music by broadcasting stations are performances of compositions which ASCAP members have created (*Ibid.*) That "music is a necessity to the broadcasting industry" paraphrases the trial judge's remark that "music is an essential part of the operation of a radio station" (R.T. p. 6). While the statement may not be completely true in this modern age of "two-way radio" or "conversation programs," it has been only too evident to listeners for many years. We can likewise assume that "each musical copyright is unique," though not with the same uniqueness as is implied in a patented article. *Cf.*

Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951).

As to each of the stipulated facts which appellant claims should have been specifically found as facts by the trial court, we find they were either immaterial or redundant in light of the findings made. (The trial judge, on motion for a new trial, found they were "repetitious or irrelevant." (R.T. p. 251)). There was no error in this regard.

II. *ASCAP and the Federal Antitrust Laws*

This litigation skirts a very perlexing problem long existing in federal antitrust law, to wit, the extent to which relief, if any, should be granted against a business for conduct which is permissible under the terms of a judicially approved consent decree. Put another way, the question is whether a consent decree by its terms can immunize against further prosecution for violation of the antitrust laws. Fortunately, however, the present case does not call for an answer to this question.

At the beginning of this litigation there were three possible results for appellant's counterclaim based on federal antitrust violations. The court could have found: (1) that there were in fact no violations of the federal antitrust laws; (2) that federal antitrust laws were violated, but since the conduct of the appellees conformed to the earlier consent decree no remedy was available; or (3) that the federal antitrust laws were violated and that the earlier consent decree offered no protection, granting relief to the appellant on its counterclaim. While either of the last two possibilities would have squarely raised

the question of immunity deriving from the earlier consent decree, it was the first possibility which actually occurred. Since the trial court found no violations of the federal antitrust laws,[1] we do not reach the question of whether activities which would otherwise be a violation of the antitrust laws could be rendered immune because consistent with the terms of the consent decree.

We agree with the trial court that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable; and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activites do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.

1. Conclusions of Law Nos. 15 and 16, C.T. p. 214.

There is an additional reason why the activities disclosed by this record do not violate the antitrust laws. ASCAP's licensing authority is not exclusive. The right of the individual composer, author or publisher to make his own arrangements with prospective licensees, and the right of such prospective licensees to seek individual arrangements, are fully preserved. There was no error in the trial court's finding that appellees have not violated the federal antitrust laws.

III. *ASCAP and the Washington State Antitrust Laws*

The State of Washington has certain antitrust laws relating to copyrights. Copyrighted music and drama are protected by R.C.W. § 19.24.010 (1957), but R.C.W. § 19.24.020 (1957) makes unlawful certain combinations of copyright owners. The latter section provides in part:

> "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: . . . ."

When copyrights are pooled, R.C.W. § 19.24.020 (1957) requires a complete detailed list of the works to be filed each year, together with a list of prices charged or demanded, with the Washington Secretary of State. R.C.W. § 19.24.055 (1957) requires such a list if the music is

used commercially within the state, or originates or is heard therein.

Washington frankly states the purpose of its requirements in R.C.W. § 19.24.060 (1957).[2] There are also special purpose statutes, defining "doing business" with respect to licensing pools such as ASCAP (R.C.W. § 19.24.100 (1957)); providing for appointment of receivers and the escheat of property for persons who refuse to abide by the state copyright laws (R.C.W. § 19.24.140 (1957)); and providing that special appearances in copyright suits are to be deemed general appearances (R.C.W. § 19.24.280 (1957)).

The court below, in findings of fact unchallenged here, noted the previous concern over the application of the Washington statute.

> "38. In 1958, certain broadcasters in the State of Washington stopped paying fees to ASCAP under existing license agreements on the alleged ground that payment of such license fees would violate Ch. 19.24, R.C.W.
>
> "39. The license agreements referred to in Finding 38 expired on December 31, 1958.
>
> "40. In 1959, a group of broadcasters, including eleven broadcasters located in the State of Washington, commenced a proceeding in the United States District Court for the Southern District of New York

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2. "The provisions of this chapter, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state . . . in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this chapter and of the state Constitution; . . ." R.C.W. § 19.24.060 (1957).

under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses to be effective as of January 1, 1959.

"41. In that proceeding, the court ruled that, in the circumstances presented, ASCAP would not be directed to issue licenses to any petitioning broadcasters in the State of Washington.

"42. Thereafter, and until November 20, 1959, ASCAP did not offer licenses to broadcasters in the State of Washington.

"43. On November 20, 1959, the owners of 61 Washington radio stations filed a petition in the United States District Court for the Southern District of New York asking that court to issue an order

"'(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;

"'(b) determining and establishing the terms and conditions of such licenses.'

"44. At the request and with the consent of the petitioners, the court (Ryan, C.J.) entered an order on November 20, 1959 directing ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963. The court ruled:

"'6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24—Laws of 1937, C. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

"7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states.'

"45. The two specified license forms were the so-called 'blanket' and 'per program' radio licenses. Both licenses grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee charged is 2.125% of the licensee's over-all revenues from sale of time on the air, after extensive deductions. Under the per program license, the licensee pays a higher percentage, but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed." (C.T. pp. 204-205)

Appellant seems to feel that since ASCAP was authorized to issue, in addition to other kinds, "blanket" licenses which might arguably be contrary to R.C.W. § 19.24.020 (1957), it has made out a valid defense to the infringement action. If such is its approach, it is mistaken. Appellant has offered no evidence that it applied for a license and could obtain only a blanket license. There is no evidence in the record that appellees did not at all times stand ready to negotiate licenses which would be lawful in the State of Washington.

On the contrary, plaintiffs (appellees here) introduced into evidence (p. Ex. 9) a copy of a letter dated August 23, 1948, from the Washington Attorney General to the Secretary of State, stating ASCAP had, by its filing[3] on April 20, 1948, demonstrated:

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3. Appellees assert that they have, since at least 1961, and each year prior to the filing of the suit on January 16, 1963, filed with the Secretary of State of Washington State a catalog of their copyrighted musical compositions, together with forms of licenses available to all users, and fees therefor. (P. Exs. 1, 5, 6; D. Exs. A-7, A-8, A-8a.)

(a) "it does issue licenses on rates assessed on a per piece system of usage . . . ,"

(b) "it does not issue licenses at a rate in excess of any per piece system in operation in any other state . . . ,"

(c) it had filed "a complete list of their copyrighted works or compositions,"

(d) it had filed "a list completely detail(ing) prices charged and demanded," and

(e) it had listed the date of each copyright, and name of the author, the names of the publishers and the dates of assignment to ASCAP.

The Attorney General concluded there had been "a reasonable compliance with the provisions of Chapter 218[4];" and that "the defects which the Supreme Court pointed out[5] have now been cured." (P. Ex. 9, p. 9 *Cf.* Finding of Fact No. 53, C.T. p. 207).

The trial court found that no public official of the State of Washington had at any time requested ASCAP to make any changes in either the form of substance of its filings. (Finding of Fact No. 52, C.T. p. 207).

Thus it seems clear that at all times, at least since the November 20, 1959 rate fixing hearing in the New York district court (in which eleven State of Washington broadcasters participated) appellant could have obtained a license from ASCAP, valid under Washington law so far as this record before us discloses, to perform publicly for profit any musical composition in ASCAP's repertory, subject only to its obligation to pay a reasonable license fee, as fixed by the New York district court.

4. Laws of 1937; Rem. Rev. Stat. 3830-1 *et seq.*, *the* forerunner of R.C.W. § 19.24.020 (1957).

5. *Taylor v. State*, 129 Wash. Dec. 591 (1948).

As appellees point out, appellant had five options open to it. Four of them were:

(1) Appellant could have obtained a blanket license and along with it the right to play as much or as little, as frequently or as rarely as it desired, any of the compositions in the ASCAP repertory.

(2) Appellant could have obtained a per program license which would have required it to pay a license fee only for those programs in which appellant broadcast music from the ASCAP repertory.

(3) It could have undertaken to deal with ASCAP members directly.

(4) Appellant could have refrained from giving public performances for profit of music in the ASCAP repertory.

Instead, appellant chose the fifth option. Appellant never obtained any license. It never sought to deal with anyone. It continued its unconscionable conduct in unlawfully appropriating appellees' property without cause and without justification.

There seems little purpose in going into detail to discuss further the reason why the court's conclusions of law are not only not erroneous,[6] but are fully supported by the findings of fact, which in turn, find support in the evidence.

We find (1) all filing requirements of the State of Washington have been met; (2) no "extortionate means" nor "terrorizing practices" are found in the bringing of

6. Conclusions of law 5 to 14, inclusive, as to Washington law, and 15 to 18, inclusive, as to federal law.

law suits against infringing broadcasters; (3) R.C.W. § 19.24.020 prohibiting blanket licenses must be read with the proviso contained therein, and raises serious doubt if an absolute prohibition against all blanket licenses was intended; (4) there was no proof of any refusal at any time by an individual appellee to grant, or to negotiate, for a separate license (in fact, there exists no proof that there was ever an attempt to obtain such a license); and (5) any would-be user has the right to have the United States District Court for the Southern District of New York fix what is reasonable as a license fee.

In Conclusion II, the trial judge found: "The ASCAP per program license may reasonably be regarded as assessing rates 'on a per piece system of usage,' as the Washington statute uses that phrase" (C.T. p. 214).

We need not specifically approve or disapprove of the trial court's interpretation of the Washington statute. If the per program license were interpreted as a blanket license and it was found that R.C.W. § 19.24.020 (1957) permits only licenses of specific individual compositions, ASCAP members nevertheless retain the absolute right to license their individual compositions, and the trial court found:

> "Plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster in the State of Washington for a license to perform any of plaintiffs' copyrighted musical compositions on any mutually agreeable basis, including 'rates assessed on a per piece system of usage.' In the last ten years, no broadcaster in the State of Washington has requested such a license from any plaintiff. No defendant has ever made any attempt to contact any plaintiff individually for the purpose of obtain-

ing licenses to play any of plaintiffs' compositions on a 'per piece' or any other basis" (Finding of Fact No. 50, C.T. p. 206).

"In the last ten years, ASCAP has not received any request from any broadcaster in the State of Washington and any ASCAP member in interest for the issuance of a license to perform one or more specified compositions" (Finding of Fact No. 51, C.T. p. 206).

We do not find it necessary to discuss the other points raised in the respective briefs.

We find the trial court's findings and conclusions were properly made, and support the judgment in favor of appellees. That judgment is correct, and is *affirmed*.

United States Court of Appeals
For the Ninth Circuit

K-91 INC.,	*Appellant,*	No. 20,074
v.		DC No. 5771
GERSHWIN PUBLISHING CORP.	*Appellees.*	

APPEAL from the United States District Court for the Western District of Washington, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is Affirmed.

A TRUE COPY:
ATTEST: March 1, 1967,
WILLIAM B. LUCK, Clerk,
By: WILLIAM E. WILSON, Chief Deputy.

Filed and entered January 13, 1967.

Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 24, 1967.
HAROLD W. ANDERSON, Clerk
By J. M. BURKE, Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, February 16, 1967

Before: BARNES, KOELSCH and DUNIWAY,
Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed February 8, 1967 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX "D"

IN THE

Superior Court of the State of Washington

IN AND FOR YAKIMA COUNTY

CASCADE BROADCASTING COMPANY, a WASHINGTON CORPORATION

CASCADE BROADCASTING COMPANY, a WASHINGTON CORPORATION (formerly Haltom),

Plaintiffs,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS

Defendant.

No. 45877

MEMORANDUM OPINION

PART I

In Pertinent Part

• • • •

Defendant contends that the requirement of a per piece license is met in this case by the issuance of a per program license. The court feels that this is analogous to block booking. The per program license is oppressive in that it requires people to buy what they do not deisre to use in order to obtain what they do desire to use. ASCAP argues that "per piece" could be interpreted to mean per piece of radio time or television time but there is nothing in the evidence or suggested in the briefs that radio or television time has ever been referred to in such terms. More important, however, the real vice is that they must buy the entire repertoire of ASCAP in order to use a part of it. Now the vice is presumably reduced substantially if, instead of having to buy the entire repertoire of ASCAP for their entire operation, they must only buy it for specified portions thereof. The per program licenses originated after the 1937 statute and are an apparent attempt to comply

therewith. However, it is still a blanket contract in the sense that in order to use any piece in ASCAP's repertoire, on a given program, the plaintiff must buy access to the entire repertoire. It must buy access to items it does not intend to use as well as those it does intend to use. This is the remedy sought to be eliminated; but it is not eliminated, only reduced, by the new form of contract.

The validity of such agreements has not been decided by our State Court but is a common subject of litigation under both the patent laws and the copyright laws in conjunction with Federal Anti-Trust Laws. The litigation in these fields clearly establishes the Federal Court's position respecting the tying of one copyright to another for the purpose of a package or blanket sale. In *United States v. Loews, Inc.*, 9 L.Ed.2d 11 at page 19 there is a discussion of this principle indicating the undesirable effects of "block booking" in the motion picture and television industry. This case relies in part upon the *Mercoid v. Mid-Continent Investment Co.* case, *supra*, and *United States v. Paramount Picture*, 92 L.Ed. 1261, which in turn, follow generally the rules established in patent cases. The vice lies in the fact that the licensor through the tying arrangement, is attempting to compel the purchase of an undesired item or less desired item in order to permit the purchase of the desired item.

In the case at bar it is clear that many prominent composers assign their rights to the defendant ASCAP and much of the music that ASCAP has under license is highly desirable and, perhaps, indispensable, to the operation of a radio or television station. A system of blanket licensing, either by licenses for the entire operation of plaintiff, or in a per program basis, requires plaintiff to also purchase items in the ASCAP repertoire that are not de-

sired or which do not seem as desirable as works available through S.E.S.A.C. or B.M.I., or other organizations of like nature, thus motivating plaintiffs to purchase ASCAP compositions in preference to comparable compositions obtainable through ASCAP's competitors. This court is of the opinion that R.C.W. 19.24 was designed to prevent just such a development.

It should be made clear the fact that the fee for defendant's music is measured by the licensee's income derived from the use thereof does not offend the statute. A fault lies in the fact that in the contracts in question the fee for a given program is not related to the actual contribution that a given ASCAP composition, or even the whole ASCAP repertoire, makes to the production of that program. The ASCAP compositions may constitute ten percent or one hundred percent of the program and the fee would be the same. The court feels that this is one of the results intended to be avoided by the statute.

Accordingly, this court holds that the licenses offered by defendant are violative of R.C.W. 19.24.

BLAINE HOPP, Jr.
Judge.

PART II

In Pertinent Part

• • • •

DUE PROCESS

As this court has previously stated, the evil sought to be remedied by the Washington Act is, among other things, the compulsion to buy a product one does not want as a precondition to buying a product one does want. The argument here made is that there is no compulsion to be dealt with. This necessitates a review of the evidence. The evidence demonstrates clearly that it is a practical impossibility for individual stations to

deal directly with individual composers and publishers in respect to the musical compositions available through ASCAP, BMI and SESAC. ASCAP has a repertoire of over a million compositions owned by 11,000 authors and publishers. Individual radio stations play 100 to 250 compositions a day involving hundreds of different compositions per year. The negotiation of each use on an individual basis is virtually impossible. The difficulties of individual negotiation gave rise to the creation of the defendant organization, even before the broadcasting industry existed. The creation of ASCAP and its counterparts facilitated the negotiations for use of copyrighted music and made such negotiation possible where it had been (and would now be) otherwise impossible. In this respect defendant, or like organizations, is virtually indispensable to the marketing of copyrighted music. Along with its usefulness, however, the creation of ASCAP and its counterparts (BMI and SESAC) gave rise to a monopolistic situation in the music industry comparable to that discussed in *Affiliated Music Enterprises v. SESAC*, 160 F.S. 865. ASCAP controls such an appreciable part of the available music as to make it a matter of economic compulsion for broadcasters to deal with ASCAP. Most stations could not operate without ASCAP compositions and survive.

A station's only alternative to blanket or per program licenses is to deal individually with copyright owners. This is so impractical it is no alternative at all.

As a result, ASCAP, unless legally prohibited, is in such a dominant position in its industry as to compel music users to deal with it and on ASCAP's terms, subject only to the provisions of the Federal Court order. The blanket licenses offered by ASCAP is comparable to the block booking prohibited by Federal law. (See *U.S. v. Paramount Pictures*, 334 U.S. 131; 68 S. Ct. 915, 93 L.Ed. 1260).

The per program is in principle the same. Both licenses require the purchase of the right to use the whole repertoire in order to use a

single part of it. While the Federal Court, presumably because of the control it exercises over the ASCAP operation, has approved blanket and per program licenses, it cannot be said that there is no reasonable relationship between the state's prohibition of a misuse thereof and the evil the state attempts to cure. The blanket license, like the block booking of motion picture, is not inherently evil. It is evil only because, as so ably stated in *Affiliated Music Enterprises v. SESAC, supra,* no "genuine economic choice" exists under which broadcasters can contract for individual compositions. If such a "genuine economic choice" existed then defendant's argument would have much force. The evil of economic *compulsion* to purchase undesired compositions in order to purchase the desired compositions is the evil the legislature attempts to cure. That evil is cured if the compulsion is removed. The removal of this evil does not necessitate *absolute* prohibition of blanket or per program licenses. Voluntary dealing in blanket licenses is not evil *per se*. It may have beneficial results for both parties in cutting the cost of doing business. The *absolute* prohibition of blanket and-or per program licenses is unnecessary to cure the evil intended to be cured, unless a "genuine economic choice" cannot otherwise be made available to music users. As hereinafter discussed, the court finds that such a choice —to purchase music on a per piece basis—can be made available to users by copyright owners without undue economic burden. For this reason, the absolute ban upon blanket licenses is unnecessary to the end intended by the legislature. • • • •